U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-265
ETA Case No.: P2000-CA-09508886/JS

In the Matter of:

NACARIO'S HOME FOR AMBULATORY AGED,
Employer,

on behalf of

CARMEN HORNILLOS LINA,
Alien.

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 11, 1999, the Employer filed an application for alien employment certification on behalf of the alien, Carmen Hornillos Lina, to fill the position of "Household domestic worker / Caregiver." (AF 92-93). The job duties included cleaning the house, which consisted of twenty-two rooms, caring for six elderly patients, including caring for their personal hygiene needs, washing dishes, doing laundry, and preparing and serving meals. Other special requirements included living on the premises and being on-call twenty-four hours per day. (AF 92).

On January 12, 2000, the California Employment Development Department advised the Employer of defects in its ETA 750A and specifically proposed amendments. First, it advised the Employer to amend its wage offer to the prevailing wage of $2,076.53 per month, instead of its listed rate of $1,000.00 per month. Next, it advised the Employer of the following restrictive requirements in its application: "[p]repare meals, wash dishes, wash-iron-dry clothes & linens, must know food nutrition, food preparation, food storage menu planning." Lastly, it advised the Employer to "clarify the job duties of 'inspect all health hazards.'" (AF 110-112). On February 8, 2000, the Employer amended the wage offer, explained that its restrictive requirements were made pursuant to the Personnel Requirement of Title 22, Section 87565, and clarified "inspect all health hazards" to mean "inspect all furnitures to be sure they are not broken all electrical appliances check for open wires, check all equipment to avoid electrocution." (AF 98-99).

On June 8, 2000, the California Alien Labor Certification Office provided instructions to the Employer on how to conduct recruitment for its job opening. (AF 107-108). In response, the Employer advertised the position in the San Francisco Chronicle on July 5, 6, and 7, 2000, and also on a bulletin board in its facility. (AF 23, 25-27, 101-103). Despite the Employer's advertisements, and an additional posting with CalJobs, the Employer reportedly received no responses for the job opening. (AF 3, 12, 23).

On July 31, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification based on an unlawful combination of duties, and unlawful terms and conditions of employment, which would have an adverse effect on similarly employed U.S. workers. Under each noted deficiency, the CO instructed the Employer on how to take corrective action. (AF 38-43, 86-91).

The Employer filed a rebuttal on August 27, 2002, correcting some of its deficiencies but raising new issues and deficiencies. (AF 44-82). The CO issued a supplemental Notice of Findings ("SNOF") on March 28, 2003. The SNOF advised the Employer to submit an amendment to Box 13 of the ETA 750A and to provide rebuttal showing that it imposes no conditions of employment contrary to California laws or regulations, and to obtain a legal opinion from the State Labor Commissioner if it believes it is not requiring its employee to be "controlled standby." (AF 15-18, 33-36).

The Employer submitted its rebuttal to the SNOF on April 7, 2003. (AF 7-10). The CO found that the rebuttal failed to cure all of the deficiencies noted in the two NOFs. As such, the CO issued a Final Determination ("FD") denying labor certification on May 15, 2003. (AF 2-4, 11-13). The Employer requested review on June 12, 2003 and the matter was docketed by the Board on August 5, 2003.

DISCUSSION

Alien employment certification cannot be granted for a job opportunity with terms, conditions or an occupational environment contrary to Federal, State or local law. 20 C.F.R. § 656.20(c)(7). Although the Employer's second rebuttal amended its application, deleting the terms "may wake up for toilet needs" and "must be available on call 24 hours a day," it still retained the live-in requirement. (AF 7). The Employer had previously attempted to justify this live-in requirement on the basis that its elderly patients could not be left alone. (AF 3, 12). The Employer's basis for the live-in requirement shows that while living in, its employee is required to tend to patients whenever their needs arise. This type of on-call work must be compensated.

Both of the NOFs required the Employer to provide evidence that the Alien was paid for overtime worked while fulfilling on-call duties as a live-in employee. (AF 16-17, 34-35, 41, 89). However, the Employer failed to provide evidence that the Alien was paid any overtime. (15-18, 33-36). Instead, the Employer provided W-2 records, showing that the Alien earned only $12,000 and $13,200 in 2000 and 2001 respectively. (AF 72-74) These annual salaries indicate that the Alien was paid minimum wage for forty hours per week, and was not paid any overtime. (AF 16-17, 34-35).

The Employer has failed to show that it compensates for the requirement to live-in and to be on-call twenty-four hours per day. Therefore, the terms of the Employer's job opportunity prove to be contrary to California law and the Employer's application for alien employment certification cannot be granted. 20 C.F.R. § 656.20(c)(7).

In California, labor laws are enforced through the Enforcement Policy and Interpretations Manual of the Division of Labor Standards Enforcement ("DLSE"). As discussed in Section 46.4 of the Manual, an employee who is required to remain at the employer's place of business to respond to emergency calls is working and must be paid for such on-call work. According to Section 47.5.4 of the Manual, if an employee's time is so restricted that he cannot "come and go as he pleases," the employer is considered to have the employee on "controlled standby." *See* Arthur Lujan, *The 2002 Update of the DLSE Enforcement Policies and Interpretations* (visited July 14, 2004) http://www.dir.ca.gov/DLSE/dlse.html. (AF 17).

Here, the Employer was notified in the SNOF that if the Employer believed that the position was not "controlled standby," as defined by the DLSE, that it must get a legal opinion to that effect from the State Labor Commissioner. (AF 17-18). The Employer's second rebuttal included a copy of a letter of inquiry it remitted to the State Labor Commissioner regarding the "controlled standby" status of its position. (AF 28). However, the Employer did not include a response from the Commissioner in its rebuttal,

nor did it make a request to the CO for an extension of time to obtain the Commissioner's response. As such, the Employer failed to provide the requested documentation.

Based on the foregoing, labor certification was properly denied.

ORDER

The CO's denial of alien employment certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.